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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Donald Kenneth Nelson,  
10                                      Petitioner,  
11 v.  
12 Mark Lamb, et al.,  
13                                      Respondents.  
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No. CV-20-00492-PHX-DLR (MTM)  
**ORDER**

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16            Before the Court is the Report and Recommendation (“R&R”) of Magistrate Judge  
17 Michael T. Morrissey (Doc. 24) regarding Petitioner’s Petition for Writ of Habeas Corpus  
18 filed pursuant to 28 U.S.C. § 2254 (Doc. 1). The R&R recommends that the Petition be  
19 denied and dismissed with prejudice. The Magistrate Judge advised the parties that they  
20 had fourteen days from the date of service to file specific written objections with the Court.  
21 (Doc. 24 at 21-22.) Petitioner filed objections to the Magistrate’s R&R on March 17, 2021  
22 (Doc. 25), and Respondents filed their response on March 24, 2021 (Doc. 26). The Court  
23 has considered the objections and reviewed the R&R *de novo*. See Fed. R. Civ. P. 72(b);  
24 28 U.S.C. § 636(b)(1). For the following reasons, the R&R is accepted.

25            Petitioner was convicted of one count of driving while impaired and one count of  
26 extreme DUI in violation of Arizona law. The Petition raises three grounds for relief. In  
27 Ground One, Petitioner claims he was denied due process because he was convicted by  
28 blood evidence that was drawn from him on the night of his arrest and allegedly tampered

1 with by the state. In Ground Two, he claims the trial court's restriction on cross-  
2 examination denied him the right to confront witnesses. In Ground Three, he alleges that  
3 the convictions for both extreme DUI and driving while impaired to the slightest degree  
4 subjected him to double jeopardy.

5 The R&R correctly found Ground One meritless. It explained that Petitioner  
6 failed to meet his burden of proving, by clear and convincing evidence, that the state  
7 court's factual determination—that he failed to prove that the blood sample was tampered  
8 with—was incorrect. In his objection, Petitioner persists that he carried his burden of  
9 showing that the blood was tampered with. (Doc. 25 at 2.) He claims the outer bag  
10 containing the evidence was not sealed properly and the Department of Public Safety  
11 ("DPS") did not include the tracking number of the sample. In further support of his  
12 argument, he presented two granular still photos from the blood-drawing officer's 27-  
13 minute body cam video and his own self-serving affidavit about the amount of alcohol he  
14 consumed. The R&R correctly pointed out that the photos do not show or prove what  
15 Petitioner argues. After reviewing the video, the Magistrate Judge correctly determined  
16 that "Petitioner's interpretation of the video footage is incorrect, and certainly does not  
17 establish clear and convincing evidence that the blood samples were tampered with."  
18 (Doc. 24 at 13.) Petitioner's photos do not clearly show three vials and the R&R  
19 correctly found that the video shows that, just before the blood was drawn, there were  
20 only two vials in the testing tray, not three.

21 Relatedly, Petitioner argues that the state's late disclosure of the body-cam video,  
22 after the motion to suppress was decided, made the denial of an evidentiary hearing  
23 unreasonable. However, as the R&R explained, Petitioner's interpretation of the video  
24 and his arguments based on the video are not consistent with what the video shows.  
25 Petitioner has not demonstrated that an evidentiary hearing would have resulted in the  
26 suppression of any evidence. Likewise, Petitioner has not shown that an evidentiary  
27 hearing would have developed any relevant evidence to support his Ground One claim.  
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1           Petitioner also disagrees with the R&R's determination that "[a]t most, Petitioner  
2 established that the seals on the vials were loose and that there was an *opportunity* for the  
3 blood samples to have been tampered with, not that they actually were tempered with"  
4 (Doc. 24 at 12), arguing that "[u]ndoubtedly, an expert could enhance the picture to the  
5 pixel level and say to a reasonable certainty the three objects in the bag are the same type  
6 of object by the color of the pixels." (Doc. 25 at 4.) The point Petitioner misses is that  
7 the burden of proof of his. Mere speculation about what an expert could find from the  
8 evidence does not come close to meeting that burden. To the naked eye, and in the  
9 context of the other portions of the video, the photos do not show what Petitioner claims  
10 they show.

11           Overall, Petitioner disagrees with the R&R's Ground One findings by making the  
12 same arguments set forth in his Petition. However, the R&R correctly applied the  
13 standard when it found that the Pinal County Superior Court's denial of Ground One was  
14 neither contrary to nor an unreasonable application of clearly-established federal law nor  
15 that the state-court decision was based on an unreasonable factual determination. The  
16 blood tampering theory was presented to the jury, who rejected Petitioner's arguments.  
17 Evidence supports the jury's findings and Petitioner's disagreement with the jury's  
18 verdict and the superior court's rejection of his claim does not support federal habeas  
19 relief. The R&R correctly concluded that Petitioner failed to carry his burden of proof.  
20 *See Davis v. Ayala*, 576 U.S. 257, 276 (2015).

21           Next, the R&R correctly found Ground Two meritless. The claim is based on the  
22 limits the trial court imposed on Petitioner's cross-examination of two prosecution  
23 witnesses. First, Petitioner was not allowed to cross-examine Officer Campano  
24 ("Campano"), who performed the blood draw on Petitioner, about a 2008 incident in  
25 which Campano received a reprimand for telling a police dispatcher to log him as  
26 answering a call he did not answer. Second, Petitioner was not allowed to cross-examine  
27 DPS Criminalist Patrick Harding ("Harding") about a lawsuit brought by another DPS  
28 Criminalist against DPS for retaliation after testifying in an alleged unsatisfactory manner

1 in another matter. The R&R correctly found that Petitioner had failed to demonstrate  
2 both that trial court erred by placing the limits on cross-examination and that the error  
3 was more than harmless.

4 The limits the trial court placed on the cross-examination of Campano did not  
5 unreasonably apply the law as set forth in *Delaware v. Van Arsdall*, 475 U.S. 673, 680  
6 (1986). The incident that Petitioner sought to explore in Campano's cross-examination  
7 occurred nearly nine years prior to trial and bore no factual resemblance to the issues in  
8 Petitioner's case. Petitioner argues that this evidence might have caused the jury to look  
9 at him in a new light, that the credibility of Campano was so important that it warranted  
10 the appointment of an expert to examine the video and stills, and that Campano might  
11 have been impeached. (Doc. 25 at 8.) However, Petitioner's speculation about what an  
12 expert *might* find is a confession of his failure to carry his burden. The Trial court's  
13 ruling was neither contrary to nor an unreasonable application of clearly-established  
14 federal law nor was the state-court decision based on an unreasonable factual  
15 determination.

16 The R&R also correctly found that, even had the limits on cross-examination  
17 violated Petitioner's Confrontation Clause rights, the constitutional error was harmless  
18 beyond a reasonable doubt. *Van Arsdall*, 475 U.S. at 681. There was ample evidence  
19 presented at trial of Petitioner's impairment and his blood alcohol levels. For example,  
20 the toxicology report of Petitioner's blood alcohol content was admitted without  
21 objection. And, Petitioner had ample opportunity to cross-examine Campano on his  
22 direct examination, and there was substantial corroborating evidence for Campano's  
23 testimony. Therefore, the R&R correctly determined that "Petitioner has not made a  
24 showing that '[a] reasonable jury might have received a significantly different impression  
25 of [the witness'] credibility had [the defense] been permitted to pursue his proposed line  
26 of cross-examination.'" (Doc. 24 at 17 (quoting *Van Arsdall*, 475 at 680).)

27 Turning to the Harding cross-examination, the R&R correctly determined that the  
28 limits did not violate the Confrontation Clause. The lawsuit that the trial court prohibited

1 Petitioner from exploring on cross-examination was unrelated to Petitioner's case and did  
2 not involve Harding. Petitioner has not shown how Harding's mere awareness of the  
3 lawsuit would have undermined Harding's testimony. Petitioner has therefore failed to  
4 show how his cross-examination of Harding could "lead to any facts from which a jury  
5 could draw a permissible inference about the reliability or credibility of the victim's  
6 testimony." *Herrera v. Att'y Gen. of Ariz.*, No. CV-17-00183-TUC-RM, 2021 WL  
7 347815, at \*6 (D. Ariz. Feb. 2, 2021).

8 Finally, the R&R correctly found Ground Three meritless. The two crimes for  
9 which Petitioner was convicted are not multiplications because each statute "requires  
10 proof of a fact which the other does not." *United States v. Wahchumwah*, 710 F.3d 862,  
11 868-69 (9th Cir. 2013) (citing *Blockburger*, 284 U.S. 299, 304 (1932)). Therefore,  
12 convictions of the crimes for which Petitioner was charged do not raise Double Jeopardy  
13 concerns. The offense of Driving Under the Influence, A.R.S. § 28-1381(A)(1), requires  
14 proof that a person in physical control of a vehicle is "under the influence of intoxicating  
15 liquor" and is "impaired to the slightest degree." In contrast, the offense of extreme DUI,  
16 A.R.S. § 28-1382(A)(2) requires proof that a person has a blood alcohol concentration  
17 ("BAC") of 0.20 or more "within two hours of driving or being in actual physical control  
18 of the vehicle and the alcohol consecration results from alcohol consumed either before  
19 or while driving or being in actual physical control of the vehicle." The elements of the  
20 statutes are different, enabling a person to violate one without violating the other. *See*  
21 *Anderjeski v. City Court of City of Mesa*, 663 P.2d 233, 234-35 (Ariz. 1983).

22 Accordingly,

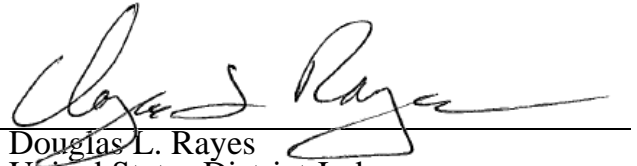
23 **IT IS ORDERED** that the R&R (Doc.24) is **ACCEPTED**.

24 **IT IS FURTHER ORDERED** that Petitioner's Objections to the R&R (Doc. 25)  
25 are **OVERRULED**.

26 **IT IS FURTHER ORDERED** that Petitioner's Petition for Writ of Habeas Corpus  
27 pursuant to 28 U.S.C. § 2254 (Doc. 1) is **DENIED** and **DISMISSED WITH**  
28 **PREJUDICE**.

1           **IT IS FURTHER ORDERED** that a Certificate of Appealability and leave to  
2 proceed in forma pauperis on appeal are **DENIED** because reasonable jurists would not  
3 find the ruling debatable, and because Petitioner has not made a substantial showing of the  
4 denial of a constitutional right. The Clerk of the Court shall enter judgment denying and  
5 dismissing Petitioner's Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. §  
6 2254 (Doc. 1) with prejudice and shall terminate this action.

7           Dated this 14th day of May, 2021.

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12           Douglas L. Rayes  
13           United States District Judge  
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